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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

BANKERS LIFE AND CASUALTY COMPANY,
Appellant,

v.

LLOYD M. CRENSHAW,
Appellee.

On Appeal from the Supreme Court of Mississippi

BRIEF OF AMICI CURIAE CBS INC., DOW JONES & COMPANY, INC., THE HEARST CORPORATION, NATIONAL BROADCASTING COMPANY, INC., NEWSWEEK, INC., TIME, INC., TRIBUNE COMPANY, THE WASHINGTON POST, THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, NATIONAL ASSOCIATION OF BROADCASTERS, AND THE SOCIETY OF PROFESSIONAL JOURNALISTS, IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. The Court Has Recognized Constitutional Limits on Punitive Damages in Prior Cases	4
II. The Unrestrained Award of Punitive Damages Violates Due Process of Law, Particularly Where First Amendment Interests Are Involved	7
A. Punitive Damages Awards Are Not Narrowly Tailored to Serve a Substantial State Interest	8
B. The State Has No Substantial Interest in Discouraging Speech on Public Issues	9
C. The Requirement of Actual Malice as a Prerequisite to Punitive Damages is Inadequate, By Itself, to Prevent Unconstitutional Awards	10
III. The Eighth Amendment Prohibits Unrestrained Punitive Damages as "Excessive Fines"	14
A. Punitive Damages Are "Fines"	14
B. Punitive Damages Are "Excessive Fines"	15
IV. The Experience of Libel Cases in the Lower Courts Demonstrates the Dangers of Unrestrained Punitive Damage Awards	18
CONCLUSION	20
APPENDIX A: Identity of Individual Amici	1a
APPENDIX B: Excerpt, *Recent Trends in Libel Damage Awards Against the Media*, Libel Defense Resource Center (LDRC) Bulletin No. 18 (December 15, 1986)	3a

TABLE OF AUTHORITIES

CASES: Page

Aetna Life Ins. Co. v. Lavoie, 106 S. Ct. 1580 (1986) 4
Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) 13
Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984) 12, 19
Brown & Williamson Tobacco Corp. v. Jacobson, 713 F.2d 262 (7th Cir. 1983) 11
Brown & Williamson Tobacco Corp. v. Jacobson, 644 F. Supp. 1240 (N.D. Ill. 1986) 17
Cohen v. California, 403 U.S. 15 (1971) 13
Cox v. New Hampshire, 312 U.S. 569 (1941) 13
Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) 4, 5
Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) ..... *passim*
Electrical Workers v. Foust, 442 U.S. 42 (1979) 7
Erzoznik v. Jacksonville, 422 U.S. 205 (1975) 13
Freedman v. Maryland, 380 U.S. 51 (1965) 12
Garrison v. Louisiana, 379 U.S. 64 (1964) 9, 11, 15
Gazette, Inc. v. Harris, 229 Va. 1, 325 S.E.2d 713 (1984) 15
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) ..... *passim*
Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6 (1970) 12
Guccione v. Hustler Magazine, Inc., 632 F. Supp. 313 (S.D.N.Y. 1986) 17
Ingraham v. Wright, 430 U.S. 651 (1977) 14
In re Gault, 387 U.S. 1 (1967) 14
Lovell v. Griffin, 303 U.S. 444 (1938) 8, 14
Marches v. Search Warrant, 367 U.S. 717 (1961) 13
NAACP v. Alabama, 377 U.S. 288 (1964) 10
National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co., 470 U.S. 451 (1985) 8
Near v. Minnesota, 283 U.S. 697 (1931) 9
Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) 7
New York Times Co. v. Sullivan, 376 U.S. 254 (1964) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

New York Times Co. v. United States, 403 U.S. 713 (1971) 8, 9, 13
Police Dept. v. Mosley, 408 U.S. 92 (1972) 13
Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) 5, 6, 14, 16, 18
Solem v. Helm, 463 U.S. 277 (1983) 15
Speiser v. Randall, 357 U.S. 513 (1958) 8, 12
Smith v. California, 361 U.S. 147 (1959) 12
Smith v. Wade, 461 U.S. 30 (1983) 10, 15, 20
St. Amant v. Thompson, 390 U.S. 727 (1968) 11
Time, Inc. v. Pape, 401 U.S. 279 (1971) 12
United States v. Carolene Products, 304 U.S. 144 (1938) 8
Young v. American Mini Theaters, 427 U.S. 50 (1976) 8

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend. I ..... *passim*
U.S. Const. amend. VIII 14
U.S. Const. amend. XIV 8

FEDERAL STATUTES:

Communications Act, 47 U.S.C. § 605 17
Copyright Act, 17 U.S.C. § 504 17

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TABLE OF AUTHORITIES—Continued

Page

Note, *Punitive Damages and Libel Law*, 98 Harv. L. Rev. 847 (1985) 11, 16, 19
Note, *Punitive Damages in Defamation Litigation: A Clear and Present Danger to Freedom of Speech*, 64 Yale L.J. 610 (1955) 16
Report, Committee on Communications Law, *Punitive Damages in Libel Actions*, 42 Record of Assoc. of Bar of City of New York 20 (Jan./Feb. 1987) 12
Restatement (Second) of Torts § 908(2) (1977) .. 13
Sack & Tofel, *First Steps Down the Road Not Taken: Emerging Limitations on Libel Damages*, 90 Dickinson L. Rev. 609 (1986) 19
Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269 (1983) 12

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STATEMENT OF INTEREST

This brief is submitted on behalf of eleven amici curiae who include broadcasters, publishers of newspapers and magazines, and associations of working journalists. Together, they comprise a broad cross-section of the news media in this country.*

These amici have an intense interest in the subject matter of this appeal. As members of the news media,

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* Written consent of both parties has been filed with the Clerk of the Court, as required by Supreme Court Rule 36.

they must operate under the constant threat of libel claims, almost all of which seek punitive damages. In recent years both the frequency and amount of punitive damage awards against the media have continued to rise at an alarming rate. The threat of such unrestrained awards affects the nation's media at all levels, from national news organizations to the smallest local newspapers and broadcasters, and interferes with their vital task of keeping the public informed. Amici therefore join in supporting the constitutional limitations urged by the appellant in this case.

For the same reasons, amici also have an interest in insuring that the limitations on punitive damages that have already been recognized by the Court in libel cases are given due consideration in this context. The reasoning of the Court in these prior cases provides both a starting point and a broader perspective for resolution of the issues presently before the Court.

Finally, amici believe it is crucial for the Court to recognize the particular threat of punitive damages to First Amendment concerns, and to consider the impact its decision on the issues in this case will have in libel cases arising out of news reporting and discussion of public affairs.

SUMMARY OF ARGUMENT

The Court has long recognized the danger of unrestrained punitive damage awards and the risk that juries will assess them as "private fines" against unpopular views and defendants. The libel decisions of this Court have discussed the problem at length and have already imposed limitations on punitive awards where discussion of public affairs is involved. The reasoning of these cases has been applied by the Court in non-libel cases as well, and serves as a valuable touchstone for addressing constitutional limitations on punitive damages in general.

As this case demonstrates, punitive damages are awarded in virtually unlimited amounts, without regard to the actual harm caused, and with inadequate standards to insure that "the punishment fits the crime." This absence of control raises serious questions under the due process clause of the Fourteenth Amendment and the excessive fines clause of the Eighth Amendment. Where First Amendment values are implicated, the constitutional infirmities of this process are even more obvious.

Any regulatory scheme affecting First Amendment freedoms (including enforcement of libel laws) demands close scrutiny of its procedures to insure that they do not infringe protected speech. The process employed must be narrowly tailored to reach no further than necessary to serve a substantial state interest. Punitive damage awards in libel cases reach far beyond those narrow restrictions to punish and deter protected speech. They fail to meet the heightened due process requirements where First Amendment interests are involved, and they operate as excessive fines under the Eighth Amendment.

The Court has attempted to control the dangers of excessive libel awards by requiring a showing of "actual malice" as the standard of liability where presumed and punitive damages are sought. However, the actual malice rule has not discouraged plaintiffs from seeking, nor juries from awarding, punitive damages in ever-increasing amounts. The rule addresses only the standard of liability; it exerts no control over the amount or nature of damage awards once the jury believes actual malice has been shown. If the stated goal of "uninhibited, robust, and wide-open" public debate is to be achieved, the Court must also broaden constitutional protection against these arbitrary and excessive awards, as urged by the appellant in this case.

ARGUMENT

I. THE COURT HAS RECOGNIZED CONSTITUTIONAL LIMITS ON PUNITIVE DAMAGES IN PRIOR CASES.

In this appeal, the Court is asked to confront the constitutional issues raised by a $1,600,000 punitive damage award against an insurance company that denied a $20,000 claim. The amount of the award, committed to the sole discretion of the jury under Mississippi law, was 3200 times greater than the maximum fine the jury could have imposed for similar conduct under an analogous criminal statute. Jurisdictional Statement at 16. The result raises obvious questions under the due process clause of the Fourteenth Amendment and the excessive fines clause of the Eighth Amendment.

Although the specific arguments advanced by the appellant are relatively new to the Court,[1] the problem of unrestrained damage awards is not. That problem has been a constant theme for over 20 years in the Court's effort to reconcile the common law of libel with competing constitutional limitations.

From the very beginning of this effort in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court recognized that the threat of unrestrained punitive damages raises severe constitutional problems as "a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law." *Id.* at 278 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963)).

In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), the Court initially rejected the argument that unlimited punitive damages were barred by the First Amendment.

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[1] The appellant in *Aetna Life Ins. Co. v. Lavoie*, 106 S. Ct. 1580 (1986), raised similar arguments. Although the case was decided on other grounds, the Court noted "these arguments raise important issues which, in an appropriate setting, must be resolved." *Id.* at 1589.

Mr. Justice Harlan writing for the Court concluded, *inter alia*, that the finding of "ill will" required for an award of punitive damages under general libel law, coupled with the heightened standard of liability announced by the Court,[2] was sufficient protection for publishers. However, in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), he expressly retreated from this position[3] and stated:

> I would hold unconstitutional, in a private libel case, jury authority to award punitive damages which is unconfined by the requirement that these awards bear a reasonable and purposeful relationship to the actual harm done.

Id. at 77 (Harlan, J., dissenting).

In the same case, Justices Marshall and Stewart concluded that punitive damages should be prohibited altogether in libel cases involving matters of public interest. They recognized that punitive damages:

> serve the same function as criminal penalties and are in effect private fines. Unlike criminal penalties, however, punitive damages are not awarded within discernible limits but can be awarded in almost any amount. Since there is not even an attempt to offset any palpable loss and since these damages are the direct product of the ancient theory of unlimited jury discretion, the only limit placed on the jury in award-

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[2] Justice Harlan's plurality opinion in *Butts* applied a standard of "highly unreasonable conduct" in place of the *New York Times* "actual malice" standard. However, the majority of the Court agreed that the actual malice rule or even greater protection should apply to "public figures." *See* 388 U.S. at 155. The "ill will" requirement on which Justice Harlan relied to justify punitive damages was therefore inconsistent with the rule ultimately adopted by the Court.

[3] "Reflection has convinced me that my earlier opinion [in *Butts*] painted with somewhat too broad a brush and that a more precise balancing of the conflicting interests involved is called for in this delicate area." *Rosenbloom*, 403 U.S. at 62 n.3.

> ing punitive damages is that the damages not be "excessive," and in some jurisdictions that they bear some relationship to the amount of compensatory damages awarded. [Citation omitted.] The manner in which unlimited discretion may be exercised is plainly unpredictable.

Id. at 82-83 (Marshall, J., dissenting).

These dissenting opinions became the touchstone of the majority opinion in *Gerzt v. Robert Welch, Inc.*, 418 U.S. 323 (1974), where the Court concluded:

> [P]unitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries . . . .

Id. at 350. The Court therefore held:

> [T]hat the States may not permit recovery of presumed or punitive damages, at least when liabiilty is not based on a showing of knowledge of falsity or reckless disregard for the truth.

Id. at 349.

Most recently, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), Mr. Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, reasserted the objections to punitive awards discussed in *Rosenbloom* and *Gertz*, stressing the "largely uncontrolled discretion" of juries to assess damages "in wholly unpredictable amounts bearing no necessary relation to the actual harm caused" as a rationale for the limitations imposed in *Gertz*. *Id.* at 778 (quoting *Gertz*, 418 U.S. at 350).

Although the driving force behind these limitations on punitive damages has been the need to protect First Amendment interests, their logic is not confined to libel and First Amendment cases. The arguments against un-

controlled jury discretion, unlimited "private fines," and unpredictable awards articulated in these cases are just as compelling when applied to the punitive damage award presently before the Court in this appeal. In fact, as Mr. Justice Brennan noted in his opinion in *Dun & Bradstreet*, the reasoning of *Gertz* has been applied in the Court's review of punitive damages in non-libel cases as well: [4]

> These cases, like *Gertz*, recognize that "the alleged deterrence achieved by the punitive damage awards is likely outweighed by the costs—such as the encouragement of unnecessary litigation and the chilling of desirable conduct—flowing from the rule, at least when the standards on which the awards are based are ill-defined." *Smith v. Wade*, [461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting).]

472 U.S. at 780 n.4 (Brennan, J., dissenting).

Amici, as members of the media, are obviously concerned with the special First Amendment problems raised by punitive damages in libel cases. But the focus on libel decisions in this brief is intended to serve a broader purpose. The opinions generated in these cases represent a major part of this Court's writings on the subject of punitive damages. Their reasoning, as noted by Mr. Justice Marshall, has been applied in other kinds of cases and serves as a useful starting point for resolving the constitutional problem of punitive damages in general.

II. THE UNRESTRAINED AWARD OF PUNITIVE DAMAGES VIOLATES DUE PROCESS OF LAW, PARTICULARLY WHERE FIRST AMENDMENT INTERESTS ARE INVOLVED.

Amici agree with appellant that the punitive award of $1,600,000 on the facts of this case raises serious issues under the due process clause of the Fourteenth Amend-

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[4] *See, e.g., Electrical Workers v. Foust*, 442 U.S. 42, 48-52 (1979) (union's breach of duty of fair representation); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270-71 (1981) (municipal liability under § 1983).

ment. U.S. Const. amend. XIV. Due process requires, as a minimum, that economic burdens imposed by a state bear some rational relationship to a legitimate state interest and are imposed in a manner that is neither arbitrary nor irrational. *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 476-77 (1985). The unlimited discretion exercised by juries in awarding punitive damages invites awards that are both arbitrary and irrational, as any review of recent punitive awards will demonstrate. The extent of the problem is highlighted by the disturbing fact that some of the largest and most irrational awards are occurring in libel cases where, in theory, First Amendment interests demand even greater protection of due process.

A. Punitive Damage Awards Are Not Narrowly Tailored to Serve a Substantial State Interest.

This Court has long recognized that the First Amendment demands careful examination of any form of state regulation that restricts free expression.[5] As this Court stated in *Speiser v. Randall*, 357 U.S. 513, 520 (1957):

> When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied.

This Court has also recognized that the allowance of punitive damages in libel cases is an exercise of state regulatory power that is subject to this constitutional limitation. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. at 759 (Brennan, J., dissenting); *New*

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[5] *Young v. American Mini Theatres*, 427 U.S. 50, 76 (1976) (Powell, J., concurring); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938); *Lovell v. Griffin*, 303 U.S. 444 (1938).

York Times Co. v. Sullivan, 376 U.S. at 269. As such, it must be closely scrutinized to insure that the remedy is in fact necessary to protect a substantial state interest and to insure that it does not encroach upon protected speech. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 349.

The award of punitive damages in libel cases fails this test both substantively and procedurally. In the words of Mr. Justice Brennan:

> The ready availability and unconstrained application of presumed and punitive damages in libel actions is too blunt a regulatory instrument to satisfy this First Amendment principle . . . .

Dun & Bradstreet, 472 U.S. at 778 (dissent).

B. The State Has No Substantial Interest in Discouraging Speech on Public Issues.

The state interest usually argued in support of punitive damages is the need to punish reprehensible conduct and to deter future unlawful acts. *See Gertz*, 418 U.S. at 350.[6] Where First Amendment values are involved, however, it is clear that the state has *no* substantial interest in deterring speech, except under the most extraordinary circumstances. *See New York Times Co. v. United States*, 403 U.S. 713, 726 (1971); *Near v. Minnesota*, 283 U.S. 697 (1931). Indeed, the central purpose of this Court in *New York Times Co. v. Sullivan* and its progeny has been to *avoid* deterring free speech, even erroneous speech and speech motivated by less than "good motives." *See Garrison v. Louisiana*, 379 U.S. 64, 69-71 (1965); *New York Times Co. v. Sullivan*, 376 U.S. at 271-72.

In *Gertz*, the Court stated that the "legitimate state interest underlying the law of libel is the compensation

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[6] Whether these goals are even appropriate in the context of *civil* litigation in general is a major issue in this appeal, as is the question of whether such punishment can be imposed without the protections of the criminal process.

of individuals for the harm inflicted on them by defamatory falsehood." 418 U.S. at 341. The Court found punitive damages to be "wholly irrelevant to [this] state interest," *id.* at 350, and stated:

> More to the point, the states have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury.

Id. at 349.

Even if a legitimate interest in punishment and deterrence may be postulated in support of punitive damage awards, the cost in First Amendment terms is too high to justify its implementation in libel suits involving public affairs. The attractive prospect of a large "bounty" in punitive damages encourages unnecessary and expensive libel suits; the fear of such awards chills legitimate speech; and the juries are given an uncontrolled weapon to "selectively punish expressions of unpopular views." *Gertz*, 418 U.S. at 350; *see also Smith v. Wade*, 461 U.S. at 59 (Rehnquist, J., dissenting). In short, the award of punitive damages reaches far beyond protection of a substantial state interest to encroach upon protected speech, and cannot be justified under the First Amendment:

> A government purpose to control or prevent activities constitutionally subject to regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedom.

NAACP v. Alabama, 377 U.S. 288, 307 (1964).

C. The Requirement of Actual Malice as a Prerequisite to Punitive Damages Is Inadequate, By Itself, to Prevent Unconstitutional Awards.

In *Gertz*, the Court restricted libel awards to compensation for "actual injury." However, the holding was qualified by the words, "*at least* when liability is not based on a showing of knowledge of falsity or reckless disregard

for the truth." 418 U.S. at 349 (emphasis added). The Court thus apparently left open the question of whether, or under what circumstances, punitive damages may be awarded if such a showing is made. *See* Note, *Punitive Damages and Libel Law*, 98 Harv. L. Rev. 847, 847 n.4 (1985).

However, the language has also been interpreted in some cases as permitting punitive damages where actual malice, and nothing more, is shown. *See, e.g., Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 273 (7th Cir. 1983); *see also, Dun & Bradstreet*, 472 U.S. at 761. Under such an interpretation, punitive damages are virtually automatic in all public official/public figure libel cases, unless state law requires some showing beyond that required to establish liability.[7] Even in other libel cases where actual malice may be an additional requirement, punitive damages may be awarded without regard to whether the defendant's conduct was truly "malicious" in the sense ordinarily required to support such an award.

The requirement of actual malice is a tool for defining the standard of *liability*, as the above-quoted language from *Gertz* indicates. *See also Dun & Bradstreet*, 472 U.S. at 770-71 (White, J., concurring). It focuses only on the defendant's attitude toward the facts, not on the defendant's attitude toward the plaintiff or any intent to do harm. It is therefore possible to have a technical finding of "actual malice" as defined by *New York Times* where there is absolutely no evidence of "malicious" conduct in the common sense of the word.[8] The jury is then

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[7] See Note, *Punitive Damages and Libel Law*, 98 Harv. L. Rev. 847, 854 n.43 (1985).

[8] The early decisions in which this Court articulated the rationale of the actual malice rule obviously did not contemplate such a possibility. *Sullivan* and *Garrison* viewed the rule as excluding from protection only the deliberate lie or "calculated falsehood." *See, e.g., Garrison*, 379 U.S. at 74-75; *St. Amant v. Thompson*, 390 U.S.

invited to award punitive damages without further restrictions. (See, *infra*, discussion at pp. 18-20.)

If punitive damages are to be allowed at all in libel cases, the First Amendment requires that the method by which they are assessed must also be confined by adequate procedural safeguards. *See Freedman v. Maryland*, 380 U.S. 51 (1965); *Smith v. California*, 361 U.S. 147 (1959); *Speiser v. Randall*, 357 U.S. 513, 521 (1958) (When a state regulates expression, "it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights."). When the procedures "create an unnecessary and undue risk of an improper verdict on the issue of . . . whether to award punitive damages, and on the measure of punitive damages," due process is violated. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 276 (1983).

In most jurisdictions, there are virtually no restrictions on the manner in which a jury may assess punitive damages in libel cases. Once the plaintiff has convinced the jury that a knowing or reckless falsehood occurred,

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727, 729-30 (1968), reaffirmed this view by requiring a finding of actual "serious doubts as to the truth" to establish "reckless disregard." These cases require a subjective awareness—indeed, "*a high degree* of awareness"—of probable falsity on the part of the publisher before actual malice might be found. *See* Report, Committee on Communications Law, *Punitive Damages in Libel Actions*, 42 Record of Assoc. Bar of City of New York, 20 (Jan./Feb. 1987).

In the lower courts, however, the required showing of actual malice has often been reduced to an exercise in sophistry by libel plaintiffs, asserting "knowledge of falsity," and thus actual malice, on the basis of semantic technicalities and interpretations. *See, e.g.*, this Court's rejection of such arguments in *Bose Corp. v. Consumers Union of United States, Inc.*, 446 U.S. 485 (1984); *Time, Inc. v. Pape*, 401 U.S. 279 (1971); *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970). The fact that such cases must reach this Court before the proper constitutional standard is applied merely highlights the continuing vulnerability of the actual malice rule to misinterpretation.

the only limitation is the "gentle rule" that the award not be "excessive." *Dun & Bradstreet*, 472 U.S. at 778 (Brennan, J., dissenting). Despite the punitive nature of the award, libel defendants have none of the protections offered criminal defendants.[9] Informal censorship "obviate[s] the need to employ criminal sanctions . . . [and] at the same time eliminate[s] the safeguards of the criminal process." *Bantam Books v. Sullivan*, 372 U.S. 58, 69-70 (1963).

Reliance on actual malice as the sole prerequisite for punitive damages bypasses even the minimal tort law consideration of whether the defendant's conduct is truly "outrageous" and prompted by "evil motive." *See* Restatement (Second) of Torts § 908(2) (1977). If a knowing or reckless falsehood can be shown to the satisfaction of the jurors, "they remain free to use their discretion selectively to punish expressions of unpopular views." *Gertz*, 418 U.S. at 350. The end result is often exactly the type of content-based punishment that the First Amendment prohibits and this Court has emphatically disallowed. *See Erzoznik v. Jacksonville*, 422 U.S. 205 (1975); *Police Department v. Mosley*, 408 U.S. 92, 95 (1972); *Cohen v. California*, 403 U.S. 15, 24 (1971). The procedure fails to satisfy the minimum due process requirements of other regulations affecting free speech.[10]

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[9] *See New York Times v. Sullivan*, 376 U.S. 254, 277 (1964):

> [A] person charged with violation of this [criminal libel] statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action. . . . And since there is no double-jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded . . . for the same publication.

[10] *See, e.g., New York Times Co. v. United States*, 403 U.S. 713 (1971) (prior restraints); *Bantam Books v. Sullivan*, 372 U.S. 58 (1963) (black-listing); *Marches v. Search Warrant*, 367 U.S. 717 (1961) (searches and seizures); *Cox v. New Hampshire*, 312 U.S.

III. THE EIGHTH AMENDMENT PROHIBITS UNRESTRAINED PUNITIVE DAMAGES AS "EXCESSIVE FINES."

The Eighth Amendment prohibits the imposition of excessive fines, excessive bail, and cruel and unusual punishment. U.S. Const. amend. VIII. Although these limitations are usually considered in the context of criminal punishment, they have also been applied by the Court where analogous civil procedures are involved. *See Ingraham v. Wright*, 430 U.S. 651, 659 n.37 (1977); *In re Gault*, 387 U.S. 1, 29 (1967).

A. Punitives Damages Are "Fines."

As the present case indicates, the analogy between the assessment of unrestricted punitive damages and the imposition of excessive fines is especially compelling. The similarities have been discussed at length in this Court's libel decisions. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. at 350 ("punitive damages . . . . are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."); *Rosenbloom v. Metromedia*, 403 U.S. at 82-83 (Marshall, J., dissenting) (punitive damages "serve the same function as criminal penalties and are in effect private fines"); *id.* at 74 (Harlan, J., concurring) ("[F]rom the standpoint of the individual plaintiff such damage awards are windfalls. They are, in essence, private fines levied for purposes that may be wholly unrelated to the circumstances of the actual litigant.").

Indeed, the first two decisions of this Court to articulate First Amendment limitations on libel law recognized virtually no difference between criminal punishment and assessment of civil damages in libel cases. *New York*

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569 (1941) (licensing and permits); *Lovell v. Griffin*, 303 U.S. 444 (1938) (licensing and permits).

Times Co. v. Sullivan, 376 U.S. at 177, held in the civil context, "what a state may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel." *Garrison v. Louisiana*, 379 U.S. at 67 n.3, held in the criminal context, "whether the libel law be civil or criminal, it must satisfy relevant constitutional standards." These observations alone should leave little question that punitive damages are directly analogous to "fines" within the purview of the Eighth Amendment and should be subject to the same protection. *See also Smith v. Wade*, 461 U.S. at 59 (Rehnquist, J., dissenting) (punitive damages are "fines" and are "quasi-criminal").

B. Punitive Damages Are "Excessive Fines."

Fines are excessive under the Eighth Amendment if they are disproportionate to the harm inflicted and to other punishments for the same conduct. *Solem v. Helm*, 463 U.S. 277, 284 (1983).[11] Although some jurisdictions impose similar limitations on punitive damages, most awards are overturned only if they are "so excessive as to shock the conscience of the Court or to create the impression that the jury was influenced by passion or prejudice." *Gazette, Inc. v. Harris*, 229 Va. 1, 41, 325 S.E.2d 713, 740 (1984), *cert. denied*, 105 S. Ct. 3513 (1985). Thus, although the word "excessive" figures in both tests, the concepts differ markedly in their application.

As the present case suggests, the rule against "excessive" punitive damages often translates into a mechanical calculation of the defendant's net worth and a percentage of that worth represented by the punitive award.

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[11] Although *Solem* is a cruel and unusual punishment case, the "Eighth Amendment imposes 'parallel limitations' on bail, fines, and other punishments." 463 U.S. at 289 (quoting *Ingraham*, 430 U.S. at 664).

Thus, even multi-million dollar awards against large corporate defendants may pass the "net-worth" test, despite the lack of any reasonable relationship to the actual harm caused or to fines that may be imposed as criminal punishments for the same conduct.

For the small newspaper or broadcaster even "a punitive damage award that is not so excessive as to shock the judicial conscience may be a sufficient financial burden to silence a voice of dissent." Note, *Punitive Damages in Defamation Litigation: A Clear and Present Danger to Freedom of Speech*, 64 Yale L.J. 610, 613 (1955). This fact was shown dramatically in the case of the *Alton Telegraph*, a small Illinois newspaper, which suffered a $9.2 million libel verdict, including $2.5 million in punitive damages. The company, valued at only $3 million, ultimately settled for $1.4 million after it was unable to raise the bond required for an appeal on the merits. The verdict and settlement have had a demonstrable effect on the ability and willingness of the paper to undertake investigative reporting on controversial matters. *See* Curley, " 'Chilling Effect' How Libel Suit Sapped the Crusading Spirit of a Small Newspaper," Wall St. J., Sept. 29, 1983, at 1, col. 1. *See also*, Massing, *The Libel Chill: How Cold Is It Out There?*, Columbia Journalism Review, May-June 1985, at 31; Note, *The Constitutionality of Punitive Damages in Libel Actions*, 45 Fordham L. Rev. 1382, 1384 (1977).

The stated rationale for these apparently irrational results is that the punitive award must carry sufficient "sting" to punish the wrongdoer and deter future wrongful conduct. *Rosenbloom*, 403 U.S. at 73 (Harlan, J., dissenting); Note, *supra* p. 11, at 849. However, the same interests in punishment and deterrence have been addressed in legislative enactments that do not begin to approach such destructive measures. The use of statutory damages, enhanced damages, and similar remedial

measures in excess of actual damages have been deemed sufficient by Congress to serve the state's interests.[12]

A rule that measures punitive damages only against the defendant's apparent wealth is not merely inconsistent with, it is antithetical to, the restrictions of the Eighth Amendment. Where the Eighth Amendment demands proportionality, evenhandedness, and predictability, punitive damages are permitted in "wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 350.

In fact, they are often thousands of times greater than comparable criminal sanctions. For example, In *New York Times Co. v. Sullivan*, 376 U.S. at 277, the Court noted that the judgment of $500,000—fairly modest in light of today's "megaverdicts"—was "1,000 times greater than the maximum provided by the Alabama criminal statute, and 100 times greater than that provided by the Sedition Act." Other cases demonstrate that multi-million dollar punitive damage awards have been imposed even where there was no evidence of actual damage. *See, e.g., Brown & Williamson Tobacco Corp. v. Jacobson*, 644 F. Supp. 1240 (N.D. Ill. 1986) (j.n.o.v. reducing compensatory damages to one dollar, but sustaining $2,050,000 punitive damage award); *Guccione v. Hustler Magazine, Inc.*, 632 F. Supp. 313 (S.D.N.Y.) (one dollar compensatory damages, $1,600,000 punitive damages), *rev'd*, 800 F.2d 298 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1303 (1987).

The Court has often acknowledged the chilling effect of such unpredictable and unlimited awards under the

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[12] *See, e.g.*, Copyright Act, 17 U.S.C. § 504; Communications Act, 47 U.S.C. § 605 (both statutes limit statutory damages to $10,000, $50,000 if willful).

First Amendment and has gone to great lengths to define appropriate safeguards that will shield defendants from overall liability in appropriate cases. However, it has not yet taken the final logical step to control the actual award of punitive damages once liability has been established.[13] This is a separate and equally critical issue, and it is now before the Court.

IV. THE EXPERIENCE OF LIBEL CASES IN THE LOWER COURTS DEMONSTRATES THE DANGERS OF UNRESTRAINED PUNITIVE DAMAGE AWARDS.

Under the reasoning of *New York Times Co. v. Sullivan* and its progeny, the heightened standards of liability and other constitutional limitations imposed on plaintiffs should have resulted in fewer and less costly verdicts against libel defendants. Experience has proved otherwise. Empirical studies show that the amounts awarded to libel plaintiffs at the trial level have actually increased dramatically, and punitive awards are more disproportionate to the actual harm suffered than in other areas of the law.

At least in this limited respect, the actual malice rule has proved inadequate, by itself, to deal with the problem of excessive damages in libel cases. The heightened standards of the actual malice rule, whether applied as a limitation on liability in public official/figure cases, or as a prerequisite to presumed and punitive damages under *Gertz*, do not discourage plaintiffs from seeking, or

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[13] Justices White, Marshall, Stewart and Harlan have previously urged the Court to direct its attention to damages specifically. *See Dun & Bradstreet v. Greenmoss*, 472 U.S. 749, 767 (1985) (White, J., concurring); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 62-78 (1971) (Harlan, J., dissenting); *id.* at 78-86 (Marshall, J., dissenting).

juries from imposing, awards at the astronomical levels of 7- and even 8-figure amounts.

Appendix B to this brief is an excerpt from Bulletin No. 18 of the Libel Defense Resource Center (LDRC), summarizing certain of its recent findings from a continuing survey of libel damage awards. The results are self-explanatory evidence of the extent to which the threat of virtually unlimited damage awards in libel actions against the media has become a reality. The underlying LDRC studies referred to in this excerpt show that over a recent four-year period 33% of all verdicts and 40% of punitive damage verdicts in media libel cases were greater than $1,000,000. The average punitive damage award in such cases was almost $3 million, and juries awarded punitive damages in nearly 60% of those libel cases, compared with less than 10% in other civil cases. A full 80% of the total dollars awarded in media libel cases were given to plaintiffs not as compensation for actual harm, but as punitive damages.

Other writers point to the irrationality of these verdicts, regardless of amount, as further evidence of the problem. *See* Sack and Tofel, *First Steps Down the Road Not Taken: Emerging Limitations on Libel Damages*, 90 Dickinson L. Rev. 609, 612-20 (1986); Note, *supra* p. 11, at 855-58.

The fact that the great majority of these damage awards are overturned or reduced on appeal suggests that the actual malice rule may be more effective at the appellate level. But it also confirms this Court's conclusion in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 510 (1984), that *de novo* appellate review of such cases is necessary to insure proper application of the rule. This fact highlights additional problems with the current lack of constraints on verdicts at

the trial level. For the small (and even the not-so-small) publisher or broadcaster, the prospect of victory only after an expensive appeal is cold constitutional comfort. The expense and judicial resources committed to such appeals is itself inconsistent with the stated goal of this Court to avoid the chilling effect of unnecessary litigation. And the prospect of punitive damage "mega-verdicts," highly-publicized at the trial stage, may actually be encouraging the prosecution of libel suits even in the face of what has been called the "almost impossible" burden of the actual malice rule. *See Dun & Bradstreet*, 472 U.S. at 771 (White, J., dissenting). The potential pay-off is simply too great to ignore.

The lottery mentality encouraged by the prospect of unrestrained punitive damage awards is not confined to libel cases. It can lead to protracted and expensive litigation in virtually any kind of claim where the defendant's conduct can be made an issue. And, as the experience with libel cases demonstrates, the promise of unrestrained rewards can subvert even the most carefully-drawn system for compensating actual injury, and convert it to an emotional appeal to jury passion and prejudice. The end result is an irrational system in which the costs—"the encouragement of unnecessary litigation and the chilling of desirable conduct"—far outweigh the alleged benefits of punitive damages. *Smith v. Wade*, 461 U.S. at 59 (Rehnquist, J., dissenting).

CONCLUSION

Punitive damages are private fines levied by juries with no discernible limit on the amount and without procedural safeguards demanded by the Fourteenth Amendment. They often bear no relation to the actual harm suffered by plaintiffs or the actual culpability of defendants. As such, they are "excessive fines" prohibited by the Eighth Amendment. Amici join with the appellant in urging constitutional limitations on such awards.

Whatever the Court's decision in this particular case, however, amici also urge the court to recognize the special threat of punitive damages in libel cases, and to ensure that its decision does not allow punishment or deterrence of conduct protected by the First Amendment.

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Respectfully submitted,

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APPENDICES

APPENDIX A

Identity of Individual Amici

CBS Inc. is the owner of television and radio broadcasting stations and the operator of national television and radio networks. The CBS Publishing Group publishes numerous nationally distributed magazines and hard-cover books.

Dow Jones & Company, Inc. publishes, *inter alia*, *The Wall Street Journal*, *Barron's National Business and Financial Weekly*, a variety of national and international electronic news services, textbooks through its Richard D. Irwin, Inc. subsidiary, and 22 community daily newspapers through its Ottaway Newspapers, Inc. subsidiary.

The Hearst Corporation is a diversified privately held company that publishes newspapers, magazines, and hard-cover and soft-cover books, and downs and operates a leading feature syndicate, television and radio broadcast stations and cable television systems.

National Broadcasting Company, Inc. is the owner of television and radio broadcasting stations and the operator of national television and radio networks.

Newsweek, Inc. publishes a weekly international news magazine, *Newsweek*.

Time, Inc. is the largest publisher of general circulation magazines in the United States. It publishes *Time*, *Fortune*, *Sports Illustrated*, *People*, *Money*, *Life*, and *Discover*.

Tribune Company is a communications company owning *The Chicago Tribune*, *The New York Daily News*, the *Orlando Sentinel*, the *Fort Lauderdale News and Sun-Sentinel*, the *Escondido (CA.) Times-Advocate*, the *Palo Alto Times-Tribune*, the *Newport News, Virginia Daily*

Press and *The Times-Herald*, and television stations in Chicago, New York, Los Angeles, Denver, Atlanta and New Orleans.

The Washington Post is a newspaper published in the Washington, D.C. area with a daily circulation of 718,000 and a Sunday circulation of 1,079,000.

The American Society of Newspaper Editors is a nationwide professional organization of more than 950 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded over 50 years ago, include ongoing efforts to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

The National Association of Broadcasters is a nonprofit, incorporated trade association of more than 4,900 radio stations, 950 television stations, and the major commercial broadcast networks.

The Society of Professional Journalists, Sigma Delta Chi, is a voluntary, not-for-profit organization of over 21,000 members representing every branch and rank of print and broadcast journalism. It is the largest and oldest organization of journalists in the United States.

APPENDIX B

[The following is an excerpt from the Libel Defense Resource Center Bulletin No. 18 published December 15, 1986.]

Recent Trends in Libel Damage Awards Against the Media

(i) *The Size of Recent Media Damage Awards.*

According to the Libel Defense Resource Center the average (mean) initial damage award in eighty-one media libel actions tried between 1980 and 1984 that resulted in a plaintiff's verdict was *in excess of $2,000,000.* LDRC Bulletin No. 11 (November 15, 1984) at 18 (Table B-9). Even eliminating the distorting effects of three awards of over $10,000,000, the average award during this period still exceeded three-quarters of a million dollars. The average award during a period of several months in 1985, when no eight-figure awards were recorded, was almost $1.8 million dollars. LDRC Bulletin No. 16 (March 15, 1986) at 44.

In terms of the sheer numbers of huge awards, LDRC has reported some *thirty* libel damage *awards* at or *in excess of $1 million* since 1980. [Citation omitted.] In contrast, only *three* media libel *awards* at the *million-dollar* level were reported *in the previous two decades.*

In terms of the relative numbers of huge awards, the pace of million-dollar libel damages has also dramatically increased, according to LDRC data. In the pre-*Sullivan* decade, of thirty-eight libel damage awards initially entered only one was in excess of $1 million—*see* Section (iii), *infra.* In contrast, in the period of 1980-84, *almost 25%* of the awards in media libel actions exceeded a million dollars. LDRC Bulletin No. 4 (Part 1) (August 15, 1982) at 8-17; LDRC Bulletin No. 11, *supra,* at 25-34 (listing cases and awards). In the last several months

of 1985, *more than half* of the media libel awards recorded by LDRC *exceeded the million-dollar mark.* LDRC Bulletin No. 16 (March 15, 1986) at 44.

(ii) *Punitive Damage Awards in Recent Media Libel Actions.*

Almost three out of five of the damage awards recorded by LDRC during the period 1980-84 included an award of punitive damages. More than one-third of those punitive awards was in excess of $1 million. Indeed, the *average punitive award* in those cases was *substantially in excess of $2.5 million.* During the last two years of the period, the average punitive damage award was *almost $3 million.* In terms of dollars awarded, during the period punitive damages accounted for some 80% of the total amount of damages awarded. LDRC Bulletin No. 11, *supra,* at 14-15.

(iii) *Comparison Data: Average Damage Awards in the Decade Prior to Sullivan.*

To put these data into further perspective the LDRC recently compiled a historical review of damages awarded in the decade prior to this Court's decision in *New York Times Co. v. Sullivan.* LDRC found that, in contrast to current trends, the average media libel award during the pre-*Sullivan* period, excluding the distorting effects of the single million dollar award during that entire decade, was *under $50,000.* LDRC Bulletin No. 17 (July 31, 1986). Indeed, the *total* amount of the awards in thirty-seven pre-*Sullivan* media libel cases reporting damage figures (again excluding the single million-dollar verdict) was $1,839,468. This total for thirty seven cases is less than a single average case in today's world of libel litigation. While adjusting for inflation accounts for some portion of this massive disparity, LDRC reports that even in constant dollars to-

day's media libel damage awards remain between 400% and 500% higher than the pre-*Sullivan* decade. *Id.*

(iv) Comparison Data: Media Libel Awards Compared to Damages in Other Areas of Tort Litigation.

LDRC has published data comparing and contrasting these libel trends with damage trends in two other areas of civil tort litigation—medical malpractice and product liability—that are also widely cited as having experienced a pattern of wild damage inflation. These non-libel torts often involve extensive economic injury and severe long-term physical debilitation. Nonetheless, libel actions against the media which rarely entail substantial economic loss, and even less frequently have provable physical impact, were found to yield higher average damage awards. The average damage award in medical malpractice actions for the period 1980-84 was slightly in excess of three-quarters of a million dollars. (When million-dollar malpractice awards were excluded this figure dropped to under a quarter of a million dollars.) The average damage award in product liability actions for that same period was just under a million dollars. (When million dollar product liability awards were excluded this figure dropped to just over a quarter of a million dollars.) Jury Verdict Research, Inc., *Injury Valuation Reports: Current Award Trends*, No. 304 (1986) at 18-19.

As for the frequency of million-dollar awards in these comparison areas, between 1980 and 1984 million-dollar awards were entered in 24% of product liability cases—under the 25% frequency in media libel actions. The frequency of million-dollar awards in medical malpractice actions was lower still—21% during the same period. *Id.*

In contrast to the notable frequency with which punitive damages are being awarded against the media in libel actions, a recent study indicates that during a period ranging from 1981 to 1984 punitive damages were awarded in a relatively low percentage of all civil cases involving an award of money damages. In two-thirds of the thirty-two reporting locations winning plaintiffs were awarded punitive damages less than 10% of the time. In New York City, Chicago and Los Angeles, for example, punitive damages were awarded in 1.6%, 2.2%, and 8.6% of the cases in which money damages were awarded, respectively. Imposition of punitive damages ranged from 0% in some locations to a maximum of 21.6% in the county with the highest rate of punitive awards. *All* locations reported far lower percentages than the recent nearly 60% average for punitive awards in media libel actions. Daniels, *Punitive Damages: The Real Story*, 72 ABA Journal 60 (August 1, 1986).